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O & A IMPEX PTE LTD

v.

PP

B

HIGH COURT MALAYA, SHAH ALAM
SOFIAN ABD RAZAK J
[CRIMINAL APPEAL NO: 41H-441-11-2011]
15 SEPTEMBER 2012

C ***CUSTOMS AND EXCISE:*** *Seizure - Seizure of goods - Beers and cigarettes - Customs investigation - Whether vessel carrying goods within area gazetted and governed by Free Zone Act 1990 and Free Zone Rules 1991 - Whether Customs Act 1967 applicable - Incorrect declaration in inwards manifest - Whether offence under s. 133(1)(a) Customs Act* D *1967 - Customs Act 1967, s. 26*

CRIMINAL PROCEDURE: *Customs investigation - Seizure of goods - Beers and cigarettes - Whether vessel carrying goods within area gazetted and governed by Free Zone Act 1990 and Free Zone Rules 1991 - Whether Customs Act 1967 applicable - Incorrect declaration in inwards* E *manifest - Whether an offence under s. 133(1)(a) Customs Act 1967 - Customs Act 1967, s. 26*

This was the appellant's appeal against the decision of the magistrate's court ordering the forfeiture of certain goods after the F hearing of an inquiry pursuant to s. 128(4) of the Customs Act 1967. The facts were that on 28 March 2008, acting on information received from an informer, the Preventive Customs division had through its port computer information system, blocked a vessel carrying three containers that was said to be containing G beer and cigarettes but were declared in the inwards manifest as 'Mounted Clutch & Brake Unit, Motorcycle Wheel & Spoke and Portable Spotlight' from leaving the port. On the same day, the shipping agent had received instructions from the shipper at the port of loading at Laem Chabang, Thailand that the three H containers were to be 'Retain-On-Board' (ROB). Nevertheless, the customs authority ordered the three containers be seized for purpose inspection. Upon a 100% inspection of the contents of the three containers, the contents were sent to the chemistry department for analysis and were confirmed to be beer and I cigarettes. The issue that arose was whether at the time the

instructions by the shipper to have the three containers "Retain-On-Board" ('ROB') were made, the vessel was within an area gazetted and governed by the rules and regulations of the Free Zone Act 1990 and thus the Customs Act 1967 did not apply. The respondent, however, was of the view that by making incorrect declarations in the inwards manifest, it was an offence under s. 133(1)(a) of the Customs Act 1967.

Held (dismissing the appeal):

(1) The Customs Act 1967 overrides the Free Zone Act 1990 and the Free Zone Rules 1991 by virtue of s. 26 of the Customs Act 1967 notwithstanding that the offence was alleged to have been committed within a Free Trade Zone area. An offence under s. 133(1) of the Customs Act 1967 had been committed by reason of incorrect declaration in the inwards manifest and the upshot of that, s. 26 of the Customs Act 1967 comes into play in that the respondent had reasonably believed that an offence under the Customs Act 1967 had been committed. Regulations 18 and 19 of the Free Zone Rules 1967 did not apply as the respondent had first invoked the usage of the provision of s. 26 by blocking the vessel and the three containers for an alleged breach of the Customs Act 1967. Thus, there were no merits in this appeal by the appellant. (paras 26 & 29)

Case(s) referred to:
Oceanborne Agencies Sdn Bhd v. PP [1997] 1 LNS 196 ***(dist)***
Sunthararaju Pachayappan v. Jabatan Kastam Diraja Malaysia [2010] 3 CLJ 865 HC ***(dist)***

Legislation referred to:
Customs Act 1967, ss. 26, 57, 114, 127, 128(4), 133(1)(a)
Free Zone Act 1990, s. 26
Free Zone Rules 1991, regs. 18(1), 19

For the appellant - JR Ravendran (Abi Mursyidin with him); M/s JR Ravendran & Assocs
For the respondent - Mohd Radzi; DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Sofian Abd Razak J:

[1] This is an appeal by the appellant against the whole of the decision of the learned magistrate, Magistrate's Court, Kelang dated the 31 October, 2011 where after the hearing of an inquiry pursuant to s. 128(4) of the Customs Act 1967 (Act 235) ordered the forfeiture of the following goods namely:

(a) 430 m/case x 50 ctns x 10 pkt x 20 batang rokok putih jenis Luffman (Menthol & Virginia);

(b) 430 m/case x 50 ctns x 10 pkt x 20 btg rokok putih jenama Luffman (Menthol & Virginia & American Blend);

(c) 1300 ctns x 12 botol x 640ml bir jenama Chang.

The Factual Matrix of the Case

[2] Acting on information received from an informer, that three containers measuring x 20 feet with serial numbers SIKU 2944340, SIKU 2912580 and CRXU 3164686 respectively will be shipped on board a vessel named 'TRINITY 050N' through the Klang Multi Terminal ('KMT'), Westport Malaysia Sdn Bhd, West Port, Pelabuhan Klang, Selangor. It was further informed that the three containers contained beer and cigarettes but were declared in the inwards manifest as 'Mounted Clutch & Brake Unit, Motorcycle Wheel & Spoke and Portable Spotlight.' On 28 March 2008, at about 12.10 the Preventive Customs division had through its port computer information system blocked the vessel carrying the three containers from leaving the port with the view of conducting a 100% physical inspection of the contents in the said three containers. It was to be noted that on the same day, 28 March 2008 at about 6.09pm the shipping agent had received instructions from the shipper at the port of loading at Laem Chabang, Thailand, that the three containers were to be 'Retain-On-Board' ('ROB'). It was conveyed to the shipping agent that the three containers would to be shipped to Singapore. The shipping agent accordingly notified the skipper of the vessel of the shipper's instruction to 'Retain-On-Board' the three containers.

[3] Nevertheless, on 29 March, 2008, at about 5.25pm, the customs authority ordered the three containers be seized for the purpose inspection at Bay 2R, KMT, the Northport, Port Kelang.

On 30 March 2008, the three containers were removed from port area and brought to the Customs Headquarters, Federal Territory, Kuala Lumpur. On 31 March 2008 at about 5.30pm, at the Customs' Headquarters, Federal Territory, Kuala Lumpur, upon a 100% inspection of the contents of the three containers witnessed by a representative of the shipper, Messrs Samudera Shipping Line Limited, found the contents to be beer and cigarettes and not as described earlier. On 2 April, 2008 notices of seizure of the contents in the three containers respectively were issued to three importers of the beer and cigarettes namely:

(i) Messrs Loyal Energy Trading No: 20, Jalan USJ 1/2K, Taman Subang Mewah, Subang Jaya for the contents in container No: SIKU 2944340 being cigarettes brand Luffman;

(ii) Messrs QS Kenchana Enterprise No: 5, Jalan Bunga Matahari, Taman Maju Jaya, Kuala Lumpur, for the contents in container No: SIKU 2912580 being cigarettes brand Luffman;

(iii) Huge Galaxy Trading, No: 17, Jalan 18/11, Petaling Jaya, Selangor, for the contents in container No: CRXU 3164686 being beer brand Chang.

[4] The exhibits were then sent to the chemistry department for analysis and were confirmed to be beer and cigarettes respectively. Investigations into the respective addresses given by the importers of the beer and cigarettes were carried out and it was revealed that the address used by Messrs Huge Galaxy Trading was being occupied by a person named Linggam a/l Munusamy whose statement was recorded and the proprietor was one Lee Yik Seng. As for the proprietor of QS Kenchana Enterprise, it was owned by one Suhut bin Hj Nawar and the address stated could not be traced. As for the address of Syarikat Energy Trading, the address stated was occupied by one Ahmad Hazik bin Hj Mohd Amin. SP5 had gone to Bangkok to carry out further investigation on the consignors as named in the inward manifest.

[5] The Issue

Whether at the Time the Instructions by the Shipper to have the Three Containers 'Retain-on-board' (ROB) that the Vessel was Within an Area Gazetted and Governed by the Rules and Regulations of the Free Zone Act, 1990 and that the Customs Act, 1967 do not Apply. Thus no Offence was Committed under s. 133(1)(A) of the Customs Act, 1967

A **The Submissions**

[6] The learned counsel for the appellant submited that the magistrate erred in law and in fact when he held that an offence had been committed under s. 133(1)(a) of the Customs Act, 1967. B It was the contention of the appellant that the three containers seized were within an area gazetted as a Free Trade Zone, a fact which was not disputed by the respondent. It was further contended that once the vessel carrying the three containers comes within the Free Trade Zone area, the specific provisions C and regulations pursuant to the Free Zone Act, 1990 and Free Zone Rules 1991 are applicable and the Customs Act do not apply. The Free Trade Zone enjoys a special privilege in that it is administered and governed by the port authority themselves. The area is fenced up to prevent access to unauthorized personnel. D There are specific provisions which govern the Free Trade Zone as spelt out in the Free Zone Act and the Customs Act respectively namely:

(i) Section 2(1A) of the Customs Act states that for the purposes of this Act (other than section 31), a free zone E shall be deemed to be a place outside Malaysia;

(ii) Section 31 of the Customs Act states that the Minister is empowered to make any order prohibiting the import or export of goods whether conditional or unconditional;

F (iii) Rule 3(2)(a) ii Customs (Prohibition of Imports) Order, 1998 *inter alia* states that no import licence is required to import goods subjected to conditional prohibition such as cigarettes or beer into a Free Trade Zone area;

G (iv) Section 4 of the Free Zone Act states that any goods or services in any form descript except for those specific prohibited unconditionally may be imported, manufactured or supplied in the Free Trade Zone without payment of any customs duty paid;

H (v) Section 10 of the Free Zone Act refers to the 1st Schedule paragraph 5 where it gazetted Westport Pulau Indah, Pelabuhan Klang as a free trade zone area and allowed to carry on any commercial activities

[7] The mistake in the description in the inwards manifest could I still be corrected to reflect the actual description of the contents therein before the containers were off loaded. If at all the appellant had committed an offence, it would be only in breach of regs. 18 and 19 of the Free Zone Rules 1991.

[8] Regulation 18(1) Of The Free Zone Rules, 1991 States As Follows:

> A person having charge of an aircraft or vessel other than a local craft or his agent shall within 24 hours, or such longer period as may be allowed by the Authority of the arrival or before the departure of the aircraft or vessel at or from a customs port or customs airport within a free trade zone present in quadruplicate in the National Language or in English, to the proper officer of the Authority.

[9] Regulation 19 Of The Free Zone Rules, 1991 States As Follows:

> (1) A person having charge of an aircraft or vessel which discharges its cargo in a free trade zone or an agent of such aircraft or vessel, shall upon completion of the discharge of the cargo or within such period as a proper officer of the Authority may allow, present to the officer of the Authority a certificate statement (in duplicate) of the outturn of such cargo.
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> (2) The certified statement referred to in subregulation (1) shall enumerate any alteration to the manifest referred to in regulation 18:
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> (a) which is caused by short shipment;
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> (b) which is caused by short landing;
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> (c) which is caused by overlanding; or
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> (d) which is caused by any other cause.

[10] It was further the contention of learned counsel that s. 133(1) of the Customs Act 1967 only applies in respect of any declaration or document required to be presented in compliance with the Customs Act 1967 and comes within the customs area unlike in the instant case the manifest was in respect of goods in the Free Trade Zone to which regs. 18 and 19 of the Free Zone Rules 1991 applies.

[11] The learned counsel then went on to refer to the case of *Oceanborne Agencies Sdn Bhd v. PP* [1997] 1 LNS 196 where the facts are distinguishable from the facts of the instant case in that, the appellant as an agent of the vessel MV Gina was charged for making an incorrect declaration in the manifest in that it was

declared that the container Nos: GSTU 2091330 was said to contain 280 bags of copper slag whereas in truth and in fact the said container contained 40 bags of copper slag, 200 innos of motor car tyres and 815 rolls of assorted textiles materials and thereby has committed an offence under s. 133(1) of the Customs Act 1967 and punishable under s. 133(1) of the same Act.

[12] The learned magistrate acquitted and discharged the appellant after defence was called. However as regards the goods involved, the learned magistrate made an order of forfeiture in respect of the goods under s. 127 of the Customs Act 1967 which states as follows:

> (1) An order for forfeiture or the release of anything liable to forfeiture under this Act shall be made … and an order for the forfeiture of goods shall be made if it is proved to the satisfaction of the court that an offence against this Act or any regulation made thereunder has been committed and that the goods were the subject matter of or were used in the commission of the offence nothwithstanding that no person may have been convicted of such offence.

[13] The learned counsel in the *Oceanborne Agencies Sdn Bhd (supra)* submitted that the learned magistrate erred in law and evidence in holding an offence had been committed even though no one has been convicted without indicating what this offence was. The learned counsel further submited that only if an offence under the Act has been committed, the order of forfeiture is mandatory and there is no discretion given. In allowing the appeal, the learned trial judge held that since the container was not loaded or shipped at Sarikei, s. 57 of the Customs Act 1967 does not apply and there was no requirement to present an outward manifest to the customs and therefore s. 133(1) of the Customs Act 1967 does not apply. The learned trial judge further held that although the outward manifest was incorrect, nevertheless it was not a declaration that comes within the ambit of the words 'required by this Act' in s. 133(1)(a) of the Act because s. 57 is not applicable.

[14] Section 57 of the Act states that

> The owner or agent of any vessel, other than a local craft, leaving any customs port shall, within seven days of the departure of such vessel, present to the proper officer of customs office a true outward manifest of the vessel in the National Language or in

English, substantially in the prescribed form, certified by such owner or agent together with a duplicate copy thereof, containing all particulars as to marks, numbers and contents of each package shipped at the customs port and the name of the shipper.

[15] It was also the contention of the learned counsel that the seizure by the customs authority pursuant to s. 114 of the Customs Act 1967 was premature, because any mistake or incorrect description of the contents in the containers found in the inward manifest can always be corrected before presenting it to the customs authority.

[16] It was also the contention of the learned counsel that having seized the three containers, the respondent failed to conduct any inquiry within the 30 days as stipulated in s. 128(4) of the Customs Act 1967 and thus the forfeiture was unlawful.

[17] Section 128(4) of the Customs Act 1967 states as follows

(4) The Magistrate of the First Class shall issue a summons requiring the person asserting that he is the owner of the goods or the proceeds of sale of such goods, and the person from whom the goods were seized, to appear before him, and upon their appearance or default to appear, due service of such summons being proved, the Magistrate of the First Class shall proceed to the examination of the matter, and *upon proof that an offence against this Act or any regulations made thereunder has been committed and that such goods were the subject matter, or were used in the commission, of such offence, shall order such goods* or the proceeds of sale of such goods or the amount secured under paragraph (a) or (b) of subsection (1) of section 115, as the case may be, to be forfeited, or in the absence of such proof, may order the release of such goods or the proceeds of sale of such goods or the security furnished under paragraph (a) or (b) of subsection (1) of section 115, as the case may be.

Section 128(1) of the Customs Act states *inter alia* that if there be no prosecution to any goods seized such goods shall be deemed to be forfeited at the expiration of one calendar month from the date of seizure of the goods unless, before expiration:

(a) a claim to such goods is made under subsection (2);

(b) a written application is made for the return of such goods under paragraphs (a) or (b) of subsection 1 of Section 115; or

A (c) such goods are returned under the said paragraph (a) or (b).

(2) Any person asserting that he is the owner of such goods and that they are not liable to forfeiture may give written notice to a senior officer of customs that he claims the
B same.

(3) On the expiration of the period mentioned in subsection (1) or if a decision is made earlier that there be no prosecution with regard to the goods, on making of the decision the senior officer of customs shall if such goods or proceeds or
C sale of such goods are not taken and deemed to be forfeited under that subsection refer the claim to the DG who may direct that such goods … be released or may direct such senior officer of customs by information in the prescribed form to refer the matter to a Magistrate of the First Class
D for his decision.

[18] On this issue the learned counsel for the appellant was of the view that the respondent has not conducted the inquiry within the stipulated time prescribed by s. 128 and therefore the forfeiture
E was unlawful. Reference was made to the case of *Sunthararaju Pachayappan v. Jabatan Kastam Diraja Malaysia* [2010] 3 CLJ 865. Nevertheless the learned deputy for the respondent was of the view that the facts of Suntharaju are distinguishable with the facts of the instant case in that in the former case no inquiry was held
F and the application was made at the instance of the applicant himself whereas in the instant case an inquiry was held *albeit* exceeding the one month period at the instance of the respondent. Witnesses were called and cross-examined by the counsel for the appellant.

G **[19]** Digesting and trying to understand the facts of the instant case it transpires that two divergence views emerged from the arguments presented by both the appellant and the respondent respectively.

H **[20]** For the appellant, it was argued that no offence was committed under 133(1)(a) of the Customs Act 1967 for making incorrect declarations and falsifying documents.

[21] The basis for that view was the fact that the appellant was
I relying on a different Act namely the Free Zones Act 1990 and regs. 18 and 19 of the Free Zone Rules 1991.

[22] The respondent was of the view that by making incorrect declaration in the inwards manifest form K4 exh. P9 (a - F) was an offence under s. 133(1)(a) of the Customs Act 1967 which precipitated the holding of the inquiry and hearing evidence before a forfeiture order was made pursuant to s. 128(4) of the Act.

[23] Section 26 of the Free Zone Act which states that

> (I) All goods in respect of which there has been or there is a reasonable caused to believe that there has been committed any offence against or **any breach of the Customs Act 1967**, the Excise Act 1976, the Sales Tax Act 1972, the Service Tax Act 1976 or this Act or any regulations made there under or any contravention of any restrictions or condition subject to which any licence, permit or authorization has been granted under such law, ... may be seized by any officer of customs in a free zone. (emphasis added)

[24] The learned deputy for the respondent was of the view that s. 26 of the Customs Act 1967 clearly gives the power to the respondent to seize the goods under s. 114 of the Customs Act 1967. The instructions by the shipper in Thailand to the shipping agents at Pelabuhan Klang to inform the port authority that the three containers were to be retain-on-board once the vessel was within a Free Trade Zone was an attempt to evade from the customs authority inspecting the contents of the three containers where the inward manifest had been incorrectly described as such.

Finding of the Court

[25] The court has read the handwritten notes of evidence of the prosecution witnesses and also the written submissions by both parties and also the ground of decision of the learned magistrate at pp. 181 to 190 of Jilid 2 of the appeal record.

[26] The court is of the view that after a critical analysis of the facts and the law applicable in this appeal, held that the Customs Act 1967 overrides the Free Zone Act 1990 and the Free Zone Rules 1991 by virtue of s. 26 of the Customs Act notwithstanding that the offence was alleged to have been committed within a Free Trade Zone area. I agree that making an incorrect declaration in the inward manifest had triggered a reasonable cause to believe that there has been an offence committed against or any breach of the Customs Act 1967 (amongst others). The act of blocking by the respondent was the basis upon which the belief was premised that there has been a breach of the Customs Act 1967.

[27] The court agrees with the respondent that the correction if allowed was restricted to minor corrections and not major corrections such as the incorrect description of the importer, exporter, addresses of consignees in Malaysia and Thailand. What was the motive of doing so, except an attempt to bring dutiable goods into the country without paying the customs duty or levy imposed in contravention of the Customs (prohibition of imports) Order 1998.

[28] The instructions to the shipping agents in Malaysia by the shipper in Thailand to inform the authority that the three containers were to be retain-on-board (ROB) was because the respondent had already done the blocking and the instruction by the shipper was an attempt to frustrate the respondent from inspecting the three containers.

[29] In conclusion, the court concurred with the learned magistrate that an offence under s. 133(1) of the Customs Act 1967 had been committed by reason of incorrect declaration in the inwards manifest and the upshot of that s. 26 of the Customs Act 1967 comes into play in that the respondent has reasonable believe that an offence under the Customs Act 1967 has been committed. The court held that regs. 18 and 19 of the Free Zone Rules do not apply as the respondent had first invoked the usage of the provision of s. 26 by blocking the vessel and the three containers for an alleged breach of the Customs Act 1967. No doubt the instruction by the shipping agent to the authority that the containers were to be ROB was on 28 March 2008 but that instruction was after the blocking done by the respondent.

[30] In respect of the case of *Suntharaju Pachayappan (supra)*, although the learned magistrate did comment on it, it was my decision that the facts in *Suntharaju (supra)* and in the instant case are distinguishable. In *Suntharaju (supra)* the applicant was the one who filed the said application for the release of the nine buffaloes and a m/lorry because no inquiry was ever held before the magistrate. Unlike in the instant case an inquiry was held although it was beyond the one month but there were reasons for the delay. Further investigations had to be carried out not only in Malaysia but also in Thailand and that took time to gather evidence. The respondent cannot be faulted for taking reasonable effort in pursuit of justice. In *Suntharaju (supra)* the case involved was not that complex and there was already a claimant known and the inquiry could be held within one month before the magistrate.

[31] The case of *Oceanborne Agencies Sdn Bhd (supra)* cited by the learned counsel for the appellant are distinguishable on the facts and does not apply to the instant case. In that case the learned magistrate acquitted the appellant after defence was called whereas in the instant case, the learned magistrate had found that an offence was committed under s. 133(1)(a) of the Customs Act 1967 by making an incorrect declaration in the inward manifest which pursuant to an inquiry held under s. 128(4) of the Customs Act 1967, ordered the forfeiture of the goods in the three containers.

[32] The court finds no merits in the appeal by the appellant and dismissed the appeal and affirmed the decision of the learned magistrate.